

## ARTICLE:

# eDISCOVERY IN NEW ZEALAND UNDER THE NEW AMENDED RULES

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## Introduction

**Discovery in litigation involves the identification of information for the purpose of legal proceedings. Electronic discovery focuses on the discovery of digital information. This paper considers recent changes to discovery rules in New Zealand.**

The New Zealand High Court Rules Committee recommended changes to the discovery rules, which are now embodied in the High Court Amendment Rules (No 2) 2011 – the new discovery rules – which make significant changes to the existing High Court Rules for discovery and inspection. Several new principles are introduced, such as co-operation and proportionality. Associated with these principles are new duties that require the preservation of documents, often before proceedings are commenced, and the duty of disclosure of documents when pleadings are filed. The High Court Amendment Rules provide a discovery checklist with which parties must consult, and depending on the specific facts of a case, may be required to make standard or tailored discovery. The High Court Amendment Rules also introduce a new listing and exchange protocol, with inspection to take place by way of electronic exchange. The new High Court Rules for Discovery entered into force on 1 February 2012. We shall first outline in brief some of the main changes to the discovery rules and then turn to consider the use of technology in relation to electronic discovery and the way in which the new rules deal with this.

## The new High Court Rules for discovery

The new High Court Rules (HCR) were designed with the intent of reducing the disproportionate costs and delays that can be caused by discovery. In addition, the Rules seek to restrict the use of discovery as a tactical tool. The

most significant changes contained in the Rules may be summarised by the following nine observations:

1. The parties must co-operate to ensure that discovery is proportionate and facilitated by agreement on practical arrangements.<sup>1</sup> This in respect, HCR R. 8.2 provides as follows:

### Co-operation

- (1) The parties must co-operate to ensure that the processes of discovery and inspection are—
  - (a) proportionate to the subject matter of the proceeding; and
  - (b) facilitated by agreement on practical arrangements.
- (2) The parties must, when appropriate,—
  - (a) consider options to reduce the scope and burden of discovery; and
  - (b) achieve reciprocity in the electronic format and processes of discovery and inspection; and
  - (c) ensure technology is used efficiently and effectively; and
  - (d) employ a format compatible with the subsequent preparation of an electronic bundle of documents for use at trial.

Moreover, the term ‘practical’ is governed by the requirement to co-operate. At a minimum, the systems or processes used to effect discovery would have to be identified, but the level of judicial involvement at a conference would scrutinize compliance with the principles expressed.<sup>2</sup>

<sup>1</sup> *Proportionality was considered in Nichia Corp v Argos Ltd* [2007] EWCA 741 at [54-55], [61-64], [73-74], [82] and [90], *Digicel (St. Lucia) Ltd v Cable and Wireless plc* [2008] EWHC 2522 (Ch) at [59-70] and [93-95], *Abela v. Hammonds Suddards Lawtel*, 2 December

2008, Deputy Judge Paul Grolami QC, at [114-124], *Earles v Barclays Bank* [2009] EWHC 2500 (Mercantile) at [32] and [68], *Goodale v The Ministry of Justice (Opiate Dependent Prisoners Group Litigation)* [2009] EWHC B41 (QB). Proportionality is central to tailored

discovery – see *Commerce Commission v Cathay Pacific Airways Ltd* [2012] NZHC 726.  
<sup>2</sup> On the need to co-operate see for example *Digicel (St. Lucia) Ltd v Cable and Wireless plc* [2008] EWHC 2522 (Ch), *Earles v Barclays Bank* [2009] EWHC 2500 (Mercantile).

2. Once litigation is reasonably contemplated, prospective parties should take reasonable steps to preserve documents that are reasonably likely to be discoverable.<sup>3</sup> HCR R. 8.3. provides as follows:

#### Preservation of documents

- (1) As soon as a proceeding is reasonably contemplated, a party or prospective party must take all reasonable steps to preserve documents that are, or are reasonably likely to be, discoverable in the proceeding.
- (2) Without limiting the generality of subclause (1), documents in electronic form which are potentially discoverable must be preserved in readily retrievable form even if they would otherwise be deleted in the ordinary course of business.

3. Parties must make initial disclosure of documents referred to in a pleading, or used when preparing the pleading. HCR R. 8.4 provides:

#### Initial disclosure

- (1) After filing a pleading, a party must, unless sub clause (2) applies, serve on the other parties, at the same time as the service of that pleading, a bundle consisting of—
  - (a) all the documents referred to in that pleading; and
  - (b) any additional principal documents in the filing party's control that that party has used when preparing the pleading and on which that party intends to rely at the trial or hearing.
- (2) A party need not comply with sub clause (1) if—
  - (a) the circumstances make it impossible or impracticable to comply with sub clause (1); and
  - (b) a certificate to that effect, setting out the reasons why compliance is impossible or impracticable, and signed by counsel for that party, is filed and served at the same time as the pleading.
- (3) A party acting under sub clause (2) must, unless the other parties agree that initial disclosure is not required, or that a longer period is acceptable, either serve the bundle referred to in sub clause (1) within 10 working days from the service of the pleading or apply for a variation of that requirement within that period.
- (4) If a party fails to comply with sub clause (1) or (3), a Judge may make any of the orders specified in rule 7.48.
- (5) Despite sub clause (1), a party does not need to disclose any document in which the party claims privilege or that a party claims to be confidential.
- (6) Despite sub clause (1), a party does not need to disclose any document that either—
  - (a) is the subject of a claim of public interest immunity; or
  - (b) is reasonably apprehended by the party to be the subject of such a claim.
- (7) Despite sub clause (1), a party does not need to include in a bundle served by that party any document contained in a bundle already served by any party or any document attached to an affidavit already filed in court.
- (8) The bundle of documents may be served either electronically or as a bundle of copies in hard copy form.
- (9) If an amended pleading is filed prior to the making of a discovery order, this rule applies to that amended pleading if it either—
  - (a) refers to documents not referred to in any earlier pleading filed by the party who files the amended pleading;
 or
  - (b) pleads additional facts.

<sup>3</sup> Counsel should make sure that at a minimum the parties directly involved in the litigation preserve relevant data, which often includes documents and e-mails, for which see Jean-luc Chatelain and Daniel B. Garrie, 'The Good, The Bad and The Ugly of Electronic Archiving: An Essay on the State of Enterprise Information Management', *The Journal of Legal Technology Risk Management* Volume 2, 2007, 90, at 93 '[S]

ilo thinking . . . results in archiving projects that lack necessary business and legal features and functionalities because their design and implementation is largely driven by the information technology department without sufficient collegial consultation with functional and legal departments.' ); Where the parties systems are not under their direct control, counsel should take reasonable steps to ensure the third parties preserve the

documents (i.e., if a client is using Google Apps to send e-mail and author documents. In the third-party control situation, counsel should advise their clients not to delete any such e-mails and documents and contact to resolve additional issues as appropriate.' ); also see the chapters covering individual jurisdictions in Stephen Mason, *Electronic Evidence* (2nd edn, LexisNexis Butterworths, 2010).

The disclosure must be made at the time that the pleading is served. Rule 8.4(4) provides that failure to comply with obligations under R 8.4(1) or (3) enables a judge to make an order under R. 7.48 which gives the judge the power to make any order that he or she thinks just. A non-exclusive list of the types of order that a judge may make are set out in R. 7.48(2)(a) – (g):

- (a) that any pleading of the party in default be struck out in whole or in part:
- (b) that judgment be sealed:
- (c) that the proceeding be stayed in whole or in part:
- (d) that the party in default be committed:
- (e) if any property in dispute is in the possession or control of the party in default, that the property be sequestered:
- (f) that any fund in dispute be paid into court:
- (g) the appointment of a receiver of any property or of any fund in dispute.

4. Parties must discuss and endeavour to agree on an appropriate discovery order prior to the first case management conference. The discovery order must address the matters set forth in the new discovery checklist in the rules. HCR R 8.11 provides:

Preparation for first case management conference

- (1) The parties must, not less than 10 working days before the first case management conference, discuss and endeavour to agree on an appropriate discovery order, and the manner in which inspection will subsequently take place, having addressed the matters in the discovery checklist in accordance with Part 1 of Schedule 9.
- (2) The joint memorandum, or separate memoranda, filed under rule 7.4 must, in addition to the matters required to be addressed under rule 7.4(3), set out the terms of the discovery order that the Judge is requested to make and the reasons for a discovery order in those terms.
- (3) If the parties agree to vary the listing and exchange

protocol set out in Part 2 of Schedule 9, they need advise the Judge only that variation has been agreed, not the details of that variation.

5. At the case management conference, the judge may dispense with the discovery, or order standard discovery, or order tailored discovery. HCR R. 8.12 provides:

Orders that may be made

- (1) At the case management conference the Judge may, under rule

8.5, make —

- (a) an order dispensing with discovery; or
- (b) an order for standard discovery; or
- (c) an order for tailored discovery, setting out categories (by, for example, subject headings and date periods) or another method of classification by which documents are to be identified.

- (2) The discovery order may —

- (a) incorporate the listing and exchange protocol set out in Part 2 of Schedule 9; or
- (b) vary that protocol; or
- (c) contain other obligations that are considered appropriate.

- (3) The discovery order may include specific directions as to the manner of discovery.

- (4) A discovery order does not require a party to discover electronically stored information that is not primary data.

- (5) Despite sub clause (4), the Judge may order a party to discover electronically stored information that is not primary data if the Judge is satisfied that the need for, and the relevance and materiality of, the non-primary data sought justify the cost and burden of retrieving and producing that data.

- (6) For the purposes of this rule, primary data means active data and readily retrievable archival data.

Where standard discovery is required by the judge, it entails the production of documents that the party relies upon and documents that adversely affect that party's, or another party's case. HCR R. 8.7 provides:

#### Standard discovery<sup>4</sup>

Standard discovery requires each party to disclose the documents that are or have been in that party's control and that are—

- (a) documents on which the party relies; or
  - (b) documents that adversely affect that party's own case;
- or
- (c) documents that adversely affect another party's case; or
  - (d) documents that support another party's case.

6. Tailored discovery<sup>5</sup> is presumed to apply instead of standard discovery in the following situations:

- a. When the costs of standard discovery are disproportionate to the matters at issue;
- b. Either party makes allegations of fraud or dishonesty;
- c. The sums at issue exceed \$NZ 2.5 million dollars;
- d. Where the parties agree to tailored discovery. HCR R. 8.9 provides:

#### Presumption as to tailored discovery

It is to be presumed, unless the Judge is satisfied to the contrary, that the interests of justice require tailored discovery in proceedings—

- (a) where the costs of standard discovery would be disproportionately high in comparison with the matters at issue in the proceeding; or

- (b) that are on the commercial list, or on the swift track (if an order is made under rule 8.5(3)); or
- (c) that involve 1 or more allegations of fraud or dishonesty; or
- (d) in which the total of the sums in issue exceeds \$2,500,000; or
- (e) in which the total value of any assets in issue exceeds \$2,500,000; or
- (f) in which the parties agree that there should be tailored discovery.

Tailored discovery can involve more or less discovery than standard discovery (HCR 8.8). In addition, tailored discovery requires discovery to proceed by category or through a method that facilitates the identification of particular documents. HCR R. 8.10 provides:

#### Obligation of party ordered to make tailored discovery

Tailored discovery requires a party against whom it is ordered to disclose the documents that are or have been in that party's control either in categories as indicated in clause 3(2) of Part 1 of Schedule 9 or under some other method of classification that facilitates the identification of particular documents.

7. Parties' have a statutory obligation to conduct a reasonable search<sup>6</sup> for discoverable documents. HCR R. 8.14 provides:

#### Extent of search

- (1) A party must make a reasonable search for documents within the scope of the discovery order.
- (2) What amounts to a reasonable search depends on the circumstances, including the following factors:
  - (a) the nature and complexity of the proceeding; and
  - (b) the number of documents involved; and

<sup>4</sup> The importance of restricting disclosure to standard disclosure was stressed in *Nichia Corp v Argos Ltd* [2008] EWHC 2522 (Ch), followed in *Vector Investments v Williams* [2009] EWHC 3601. For other cases on standard disclosure and its limitations see *Digicel (St Lucia) Ltd v Cable and Wireless plc* [2008] EWHC 2522 (Ch) and *Berezovsky v Abramovich* [2010] EWHC 2010 (Comm) where *Gloster J* declined to make an order for

disclosure going beyond standard disclosure before initial disclosure had been given.

<sup>5</sup> HCR 8.8. R. 8.8 provides: Tailored discovery. Tailored discovery must be ordered when the interests of justice require an order involving more or less discovery than standard discovery would involve. See *Commerce Commission v Cathay Pacific Airlines* [2012] NZHC 726 for tailored discovery but not in the context of the use of e-discovery tools.

<sup>6</sup> Whether there has been a reasonable search will be determined by the court – *Digicel (St Lucia) Ltd v Cable and Wireless* [2008] EWHC 2522 (Ch); *Earles v Barclays Bank* [2009] EWHC 2500 (Mercantile) where the judge criticised the failure to procure copies of e-mails, and emphasised the solicitor's duty to take appropriate steps to ensure that sufficient disclosure is given.

- (c) the ease and cost of retrieving a document; and
- (d) the significance of any document likely to be found; and
- (e) the need for discovery to be proportionate to the subject matter of the proceeding.

8. Documents must be listed in accordance with a new listing and exchange protocol set out in Part 2 Schedule 9 of the Rules, unless the parties agree otherwise. HCR R. 8.15 provides:

**Affidavit of documents**

- (1) Each party must file and serve an affidavit of documents that complies with this rule, subject to any modifications or directions contained in a discovery order.
- (2) In the affidavit of documents, the party must—
  - (a) refer to the discovery order under which the affidavit is made; and
  - (b) state that the party understands the party's obligations under the order; and
  - (c) give particulars of the steps taken to fulfil those obligations; and
  - (d) state the categories or classes of documents that have not been searched, and the reason or reasons for not searching them; and
  - (e) list or otherwise identify the documents required to be discovered under the order in a schedule that complies with rule 8.16 and Part 2 of Schedule 9; and
  - (f) state any restrictions proposed to protect the claimed confidentiality of any document.

(3) The affidavit may be in form G 37.

(4) Each party must file and serve the affidavit of documents within such time as the court directs or, if no direction is made, within 20 working days after the date on which the discovery order is made.

R. 8. 16 provides:

Schedule appended to affidavit of documents.

(1) The schedule referred to in rule 8.15(2)(e) must, in accordance with that discovery order, list or otherwise identify documents that—

- (a) are in the control of the party giving discovery and for which the party does not claim privilege or confidentiality;
  - (b) are in the control of the party giving discovery for which privilege is claimed, stating the nature of the privilege claimed;
  - (c) are in the control of the party giving discovery for which confidentiality is claimed, stating the nature and extent of the confidentiality;
  - (d) have been, but are no longer, in the control of the party giving discovery, stating when the documents ceased to be in that control, and the person who now has control of them;
  - (e) have not been in the control of the party giving discovery but which that party knows would be discoverable if that party had control of them.
- (2) Subject to Part 2 of Schedule 9, documents of the same nature falling within sub clause (1)(b), (d), or (e) may be described as a group or groups.
- (3) The description of documents for which privilege is claimed under sub clause (1)(b) must be sufficient to inform the other parties of the basis on which each document is included in a group under sub clause (2).
- (4) The schedule must include documents that have previously been disclosed under rule 8.4.
- (5) The schedule need not include—
- (a) documents filed in court; or
  - (b) correspondence that may reasonably be assumed to be in the possession of all parties.

9. Inspection of documents occurs by way of an electronic exchange of documents, unless the court orders otherwise. HCR R. 8.27 provides:

**Inspection of documents**

(1) As soon as a party who is required to make discovery has filed and served an affidavit of documents, that party must, subject to rule 8.28, make the documents that are listed in the affidavit and that are in that party's control available for inspection by



way of exchange.

(2) Documents must be exchanged in accordance with the listing and exchange protocol in Part 2 of Schedule 9.

(3) If a discovery order exempts a party from giving discovery and inspection electronically, that party must make the documents listed in the affidavit of documents available for inspection in hard copy form, and must promptly make those documents available for copying if requested.

(4) A party who has received a document electronically under this rule may, on giving reasonable notice in writing, require the person giving discovery to produce the original document for inspection.

This means that paper documents must be scanned electronically so that electronic copies can be exchanged.

In addition to these these nine observations, the Rules impose additional costs on the parties, relating to the preservation of documents, requiring the parties to engage in dialogue sufficient to reach agreement on discovery and inspection issues. These additional costs are predicated on the assumption that by requiring these actions early on in the proceedings, the parties will realize substantial savings later in the course of the proceedings.<sup>7</sup>

### The role of technology under the new High Court Rules for discovery

A theme that runs through the new discovery rules is the need for parties and counsel to utilize technology in a manner that is both efficient and effective. The Rules Committee noted in its consultation paper that:

‘... delay and costs can be reduced by moving to an electronic discovery regime while the efficiency of the discovery process and the ability to achieve a just

outcome can be improved’<sup>8</sup>

The committee further recognized that:

‘technology can provide more accurate solutions which can assist in identifying the most important documents more quickly ... the move to electronic discovery does no more than reflect what is happening in the profession in any event’.<sup>9</sup>

These recommendations are incorporated in R. 8.2(2)(c), which requires the parties to ensure technology is used efficiently and effectively during the different phases of the discovery process.

### Electronic discovery

Rule HCR 8.10 defines electronic discovery as the methods by which the parties use electronic means to assist in finding, identifying, locating, retrieving, reviewing, listing or exchanging documents to satisfy discovery obligations. The Rules do not mandate the use of digital tools and methods, but such tools and methods, when properly implemented, can reduce the costs of the litigation and accord with the principles of cost and proportionality.

As part of the obligation to conduct a reasonable search, the parties must recognize what constitutes electronically stored information.<sup>10</sup> The Rules define electronically stored information (ESI) as information that is stored electronically, which includes: e-mail, SMS text messages, voice mail, instant messages, word processed documents, spread sheets, data bases, images such as JPEG or TIFF files, PDFs, electronic calendars, audio files and internal and external web sites.<sup>11</sup> Under the Rules, it is possible that parties will need to search for ESI on readily accessible systems, enterprise servers and back-up systems. In some circumstances, it is possible that the parties will need to search for ESI that might have been

<sup>7</sup> New Zealand has taken some time to adopt this model. United States of America (2006), Australia (2009), Canada (2009) and England & Wales (2009) following the Cresswell Report of 2004 have reformed their discovery rules to varying degrees in an attempt to reduce costs and delays and to lessen the tactical use of disclosure/discovery, for which see Electronic Evidence. The Federal Court of Australia adopted Practice Note CM6 addressing Electronic Technology in Litigation and an associated Pre-Discovery Conference checklist. Notwithstanding New Zealand’s apparent ‘late entry’ Lord Justice Jackson remarked in 2011 ‘Interestingly New Zealand is ahead of us here. The New Zealand Rule

Committee has recently adopted a variant of the menu option. New Zealand’s High Court Amendment Rules (No. 2) 2011 will come into force on 1st January 2012. These rules provide that in any substantial case the court will not automatically order standard discovery. Instead it will choose between a range of options, including no discovery, standard discovery and “tailored discovery”. Andrew King, ‘Lord Justice Jackson: “New Zealand Is Ahead of Us” E-Discovery New Zealand at <http://www.e-discovery.co.nz/blog/lord-justice-jackson-nz-is-ahead-of-us.html>. For an overview of the English Rules see Stephen Mason ‘England & Wales’ in Electronic Evidence.

<sup>8</sup> Rules Committee Consultation paper:

Proposals for reform of the law of discovery including electronic discovery and inspection 2.10 at paragraph 18.

<sup>9</sup> Rules Committee Consultation paper: Proposals for reform of the law of discovery including electronic discovery and inspection 2.10 at paragraph 18.

<sup>10</sup> Part 3 Glossary Note also R 1.3 which defines a ‘document’ as, amongst other things, ‘information electronically recorded or stored, and information derived from that information’.

<sup>11</sup> Part 3 Glossary.

deleted or for data that is not visible to the naked eye, such as metadata or embedded data.

To assist with some technological issues arising in e-discovery, the Rules include a helpful glossary of technical terms. The glossary defines 'metadata' as data about data. It states:

'... in the case of an electronic document, metadata is typically imbedded information about a document that is not readily accessible once the native electronic document has been converted into an electronic image or paper document, for example, the date of which the document was last printed or amended. Metadata may be created automatically by a computer system (system metadata) or maybe created manually by a user (application metadata) depending upon the circumstances of a case, metadata may be discoverable'<sup>12</sup>

The glossary also defines PDF in the following way:

'PDF (portable document format) is a file format that enables documents to be displayed or printed in a manner that preserves the format originally used by the author'<sup>13</sup>

The Rules state that a PDF file may be either a searchable image file or an unsearchable image file. These two types of ESI demonstrate the potential problems if counsel fails to understand the various systems that are subject to discovery. The Rules not only discuss the systems component of electronic discovery, but also discuss how the data is accessed, differentiating between primary data and non-primary data.<sup>14</sup> Primary data is defined as data that is readily retrievable,<sup>15</sup> whereas non-primary data is generally archival data that is not readily retrievable.<sup>16</sup> Data stored on enterprise back-up tapes for disaster recovery purposes contain non-primary data for the purposes of the Rules.

Counsel, when reviewing the new Rules, should pay particular attention to the concept of 'native electronic document',<sup>17</sup> because if counsel gets it wrong, it could have an effect on the cost, and possibly adversely affect the outcome of the matter. The Rules define native

electronic document or native file format as 'an electronic document stored in the original form in which it was created by computer software programme'.<sup>18</sup> Lawyers often create a document in Microsoft word and convert it into a PDF before sending a copy of the document as an attachment to an e-mail. In such a case, the Microsoft word document is the 'native electronic document' and the PDF document is not, because the PDF does not contain all the metadata found in the Microsoft word document. The Rules allow lawyers to exchange documents electronically in native format or PDF, which includes e-mails.<sup>19</sup>

### Discussion of the process set out in the discovery checklist

The new Rules provide a discovery checklist which should be used at the beginning of proceedings. The checklist provides a list of the items that must be considered for the discovery process, leading up to the first case management conference and beyond, and reflects the early discovery obligations of the parties and of counsel. The Discovery checklist is contained in Schedule 9 Part 1 of the Rules. There are five major parts to the checklist. They are: assessing proportionality; the extent of the search; tailored discovery; listing and exchange, and presenting documents at trial.

### Assessing proportionality

Assessing proportionality and the extent of the search are the first obligations, and involve five stages elaborated in the checklist. They can be summarised as follows:

Stage 1, Identify:<sup>20</sup> review pleadings; list relevant issues; identify relevant categories of documents.

Stage 2, Locate:<sup>21</sup> hard copy and e-documents; other people involved (e.g. lawyers, accountants); the duty to preserve data which is located should be emphasised.<sup>22</sup>

Stage 3, Assess:<sup>23</sup> volume and ease of assembly; methods; time and cost involved; proportionality.<sup>24</sup>

<sup>12</sup> Part 3 Glossary.

<sup>13</sup> Part 3 Glossary.

<sup>14</sup> HCR 8.12(4) – (6).

<sup>15</sup> HCR 8.12(4) – (6).

<sup>16</sup> HCR 8.12(4) – (6).

<sup>17</sup> Clause 8(5)– Listing and Exchange Protocol which provides the following applies in relation to native electronic documents: (a) electronic documents that do not lend themselves to conversion to PDF (for

example, complex spread sheets, databases, etc) may be exchanged in their native electronic format:

(b) parties may agree on a list of electronic file types that do not lend themselves to conversion to PDF.

<sup>18</sup> Part 3 Glossary.

<sup>19</sup> If e-mails are exchanged in native format they can be viewed by opening them in an e-mail client. However if e-mails are

exchanged in PDFs, an electronic photocopy of the e-mail is created and can only be viewed by looking at the PDF.

<sup>20</sup> Checklist clause 1.1(a).

<sup>21</sup> Checklist clause 1.1(b).

<sup>22</sup> HCR 8.3 and 8.13.

<sup>23</sup> Checklist clause 1.1(c).

<sup>24</sup> Checklist clause 1.1(d).

Stage 4, Discuss:<sup>25</sup> proportionality; protocol; duty to seek to agree.<sup>26</sup>

Stage 5, Memorandum:<sup>27</sup> aim for joint memorandum; if separate, justify position.

### Extent of the search

The extent of the search obligations carries additional responsibilities, specifically the parties must, in accordance with the requirements set out in paragraph 2:

- (a) assess whether any of the methods identified may assist in locating electronic material efficiently; and
- (b) consider whether it would be appropriate to seek a tailored discovery order about the extent to which a party must search for documents to reflect the circumstances of the case, including (but not limited to) the following:
  - (i) the number of documents involved; and
  - (ii) the nature and complexity of the proceeding; and
  - (iii) the ease and expense of retrieval of any particular document; and
  - (iv) the significance of any document that is likely to be located during the search.

### Tailored discovery

Tailored discovery does not inevitably follow in every case. A central issue parties should consider in item (ii) above, is whether the default position is suitable and proportionate, or whether a tailored discovery order is required to address the extent to which a party must search for documents and which reflects the particular circumstances of the case. Factors that are relevant include (but are not limited to) the following:

- a) the number of documents involved;
- b) the nature and complexity of the proceeding; and
- c) the ease and expense of retrieval of any particular document; and

d) the significance of any document which is likely to be located during the search.

If there is tailored discovery by agreement, the following matters should be covered by the parties:

- a) the categories of documents required to be discovered by the parties (limited to what is reasonable and proportionate);
- b) methods and strategies to conduct a reasonable and proportionate search for the documents;
- c) whether a staged approach may be appropriate.

### Listing and exchange requirements

The discovery checklist, as provided for in the 'Discovery checklist and the listing and exchange protocol', states:

To reduce unnecessary costs of listing documents, parties are encouraged to—

- (a) use native electronic versions of documents as much as possible; and
- (b) use the extracted metadata from native electronic documents, instead of manually listing documents; and
- (c) convert documents to image format only when it is decided they are to be produced for discovery; and
- (d) if document images are to be numbered, only number those images if they are to be produced for discovery.<sup>28</sup>

The discovery checklist, in addressing the issue of tailored discovery, identifies methods and strategies for locating documents.<sup>29</sup> The parties must seek agreement on the methods and strategies appropriate to conduct a reasonable and proportionate search for the documents, including the following, as set out in Rule 8 Schedule 9 (3) (2)(a)(ii):

- (A) Appropriate key word searches;
- (B) Other automated searches and techniques for

<sup>25</sup> HCR 8.11 and checklist clause 1.1(d).

<sup>26</sup> It is important to emphasise that each party must assess and discuss with the other parties whether any estimated costs are proportionate to the sums in issue or the value of the rights in issue in the proceeding. The overall costs of discovery will be the cumulative costs of each party providing their own discovery, and

also the costs of inspecting documents discovered by the other parties. Assessing this overall proportionality may require the parties to share relevant information on a co-operative basis, namely their estimates of the approximate number of hard copy and electronic documents involved, and any particular issues that might affect the costs of discovering and inspecting the

documents.

<sup>27</sup> Rule 8.11.

<sup>28</sup> HCR 8.11 Discovery Checklist Part 1 Schedule 9.

<sup>29</sup> HCR 8.11 Discovery Checklist Part 1 Schedule 9.



culling documents including concept searching, clustering technology, document prioritisation technology, email threading, and any other new tool or technique;

(C) A method to be used to identify duplicate documents; and

(D) Where the specialist assistance is required to locate documents efficiently and accurately.

### Culling documents and key word searching<sup>30</sup>

The Rules discuss key word searching, which is searching for information using specific terms. However, parties should not infer that a result means that the documents are relevant, because the key word used can have different meanings based on how the term is used. Thus, when parties elect to locate documents by way of key words, the selection of the appropriate terms is critical. In conjunction with constructing the appropriate terms, the parties should seek to construct a process and protocol to avoid the issues set forth above.<sup>31</sup>

### Document review and duplicate documents under the new rules

In the glossary, the Rules discuss the reduction of documents that have to be reviewed by lawyers. One way is the process of identifying and removing duplicate documents from a collection of documents so that one unique copy of each document remains. In the paper world, the process of ‘de-duplication’ required being made aware of every copy of a document to ascertain if there were duplicates, and if so, how many duplicate copies existed. The tools for ‘de-duplication’ make the identification of duplicates more effective. This, and other aspects of reduction by the use of technology, serves to assist and streamline document review, which is the largest cost of the discovery process.

Some lawyers are still using the same practices that they used when reviewing paper documents, thus adding

unnecessary cost and burden to the discovery process. It is not unknown for the document review process to be carried out by printing out hardcopies of all the electronic material and then laboriously reading through document by document. For the reduction of the costs of discovery, and to maintain the emphasis upon proportionality, it is important to reduce the volume of documents for lawyers to review. Much of the information that may be reviewed will be irrelevant or redundant duplicated information, and it is necessary to address removing or ‘sieving’ the information prior to starting the review. For this reason it is important for the parties to discuss early on how they will go about identifying duplicate documents.

### Solutions to streamline the discovery process and reduce the burden and cost to the parties

To reduce the costs of electronic discovery, various techniques using products on the market enable a lawyer to work fairly efficiently to identify relevant data for the purposes of discovery. To take advantage of the way such technologies work, it is useful for a person with knowledge of the matter to act as the reviewer. In this way, the process can be quicker and cheaper. Some of the strategies are suggested in the checklist. These include: concept searching; clustering technology; predictive coding or document prioritisation technology<sup>32</sup>; e-mail threading; near duplicate identification<sup>33</sup>, and native file review.

Many e-mails contain earlier messages and are constructed in the form of a thread or a chain. The majority of information for the purposes of discovery comprise e-mails. This means that e-mail threading technology has become essential. By identifying the end point of the e-mail thread, redundant e-mails do not have to be reviewed. Again, the benefit of the technology is in the review exercise, where parties can focus on the entirety of the e-mail exchange instead of shifting through copies of the same exchange. The technology allows for

<sup>30</sup> For discussion of searching techniques see *Digicel(St Lucia) Ltd v Cable and Wireless plc* [2008] EWHC 2522 (Ch) where additional key word searches were directed; *Goodale v Ministry of Justice (Opiate Dependent Prisoners Group Litigation)* [2009] EWHC B41 (QB) where it was directed that there should be sampling to see which of 31 initial key words needed fine tuning; *William A. Gross Constr. Assocs., Inc. v. American Mfrs. Mut. Ins. Co.* No. 07 Civ. 10639, 2009 WL 724954 (S.D.N.Y. March 19, 2009) which emphasised the need for co-operation when selecting key words.

<sup>31</sup> For some work on this, see Simon Atfield

and Ann Blandford, ‘E-disclosure viewed as “sensemaking” with computers: The challenge of “frames”’, *Digital Evidence and Electronic Signature Law Review* 5 (2008), pp 62–67; Jason R. Baron, ‘Toward a new jurisprudence of information retrieval: What constitutes a “reasonable” search for digital evidence when using keywords?’, *Digital Evidence and Electronic Signature Law Review* 5 (2008), pp 173–178.

<sup>32</sup> As to the way in which predictive coding may be effected, see Magistrate Judge Peck’s decision in *Da Silva Moore v. Publicis Groupe & MSL Group*, No. 11 Civ. 1279 (ALC) (AJP) (S.D.N.Y. Feb. 24, 2012. On appeal District

Court Judge Andrew L. Carter, Jr. denied the objections of plaintiffs and upheld Magistrate Judge Peck’s orders approving the defendant’s use of predictive coding to review its own documents and adopting the defendant’s proposed protocol. *Da Silva Moore v. Publicis Groupe SA*, No. 11 Civ. 1279 (ALC) (AJP) (S.D.N.Y. Apr. 25, 2012).

<sup>33</sup> For an example of the sanction of costs for failure to properly de-duplicate documents see *West African Gas Pipeline Company Ltd v Willbros Global Holdings Inc* [2012] EWHC 396 (TCC) (27 February 2012).

parties to examine e-mails more quickly, and allows for a more accurate assessment without having to focus upon the e-mail exchange in its entirety.

Near duplicate identification is not mentioned in the particular methods and strategy section in clause 3(2)(a)(ii) of the checklist, but it is an important method to assist in proving the costs and accuracy of the document review. Near duplicate technology identifies documents that have similar content, although the document might not be an exact duplicate. The technology groups all of the near duplicates together. This enables the documents to be reviewed at the same time. This allows the reviewer to quickly focus on the differences, and move through the documents more quickly and accurately. E-mail threading and near duplicate technology can be used on paper documents as well as electronic documents. However, the accuracy of the paper documents will depend upon the quality of the text searchable content or OCR (optical character recognition) when the document is scanned.

Finally, native file review allows lawyers to view documents in the format in which they were intended to be viewed. Spreadsheets and databases, for example, may only be able to be accurately assessed in their native applications. This can have considerable cost saving. Converting all documents to PDF prior to the document review (rather than after it) will usually add unnecessary expense to the discovery process. It will usually be more efficient to review documents in their native file format and then only convert the relevant documents to PDF for the electronic exchange of documents.

The discovery checklist and the listing and exchange protocol do not, of course, stand alone. The checklist is part of the preparation for the first case management conference (8.11).

It is at the case management conference that the judge may either make an order dispensing with discovery, or make an order for standard discovery, or make an order for tailored discovery, setting out the categories or other method of classification by which documents are to be identified. Tailored discovery is clearly cost related (8.9(a)), and it is implicit that all parties, including the judicial officer, should have the knowledge of the benefits, advantages and disadvantages of the various technologies that are available. It is the view of the authors that some form of judicial education process in the operation of the various review technologies is necessary. It is noted that the checklist makes specific reference to the issue of whether or not specialist assistance may be required to locate documents sufficiently and accurately. It is suggested that this specialist assistance will probably be in the form of

a lawyer who has specialised technology skills in the discovery process. A person with specialist knowledge will have to be aware of the legal requirements of discovery, relevance, privilege and such like, and a good working knowledge of the Rules, together with a knowledge of the appropriate technologies that may be available.

## Conclusion

Technology has created problems in the discovery of digital data by vastly extending the scope of potential discovery, but it may also be a solution. The technology must be used efficiently and effectively to enable a more proportionate and cost effective discovery process. Technology has the capacity to assist the parties in every aspect of the process from the identification of information through to its presentation in the court. However, the main advantage relates to the cost benefits that it can bring at the initial stages.

Few firms will have the volume of litigation to equip themselves with all the possible tools to assist in their discovery obligations. Service providers or the specialist assistance referred to in the checklist may therefore assist with the discovery process. For law firms, this will reduce any potential costs or infrastructure rearrangements that may be necessary. However, it must be made clear, and it will probably be apparent from the discussion that has gone before, that the particular methods of discovery will depend upon the case in hand. Different products may be more relevant to the different parts of the discovery process. One thing is clear: lawyers and judges are going to have to become intimately aware of the technologies that are available and of the technological processes that can underlay the discovery process if the advantages of cost reduction and proportionality that underlie the rules are to be achieved.

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